STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2001 OAL Determination No. 2

March 19, 2001

Requested by: **UNION OF AMERICAN PHYSICIANS & DENTISTS**

Concerning: **CALIFORNIA DEPARTMENT OF HEALTH SERVICES – Changes to Regulations Permitting Clinical Psychologists at Licensed Health Care Facilities to Authorize Physical Restraints for Patients**

Determination issued pursuant to Government Code Section 11340.5; California Code of Regulations, Title 1, Section 121 et seq.

ISSUE

Do changes to existing regulations which would permit clinical psychologists at licensed health care facilities to order patients to be placed in physical restraints constitute "regulations" as defined in Government Code section 11342.600, which are required to be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act (Gov. Code, div. 3, tit. 2, ch. 3.5, sec. 11340 et seq.; hereafter, "APA")? [1]

1. This request for determination was filed by the Union of American Physicians & Dentists, 1330 Broadway, Suite 730, Oakland, CA 94612-2506, (510) 839-0193. The California Department of Health Services' response was filed by Keith Yamanaka, Deputy Director and Chief Counsel, Department of Health Services, 714/744 P Street, P.O. Box 942732, Sacramento, CA 94234-7320, (916) 323-3279. This request was given a file number of 99-022. This determination may be cited as "**2001 OAL Determination No. 2.**"

CONCLUSION

Changes to existing regulations permitting clinical psychologists at licensed health care facilities to order patients to be placed in physical restraints constitute "regulations" as defined in Government Code section 11342.600, and are required to be adopted and codified pursuant to the rulemaking procedures of the APA.

BACKGROUND AND ANALYSIS

The Department of Health Services ("Department") is responsible for licensing and regulating health care facilities throughout the State of California. (Health & Safety Code sections 1250, 1265, and 1275.) Accordingly, the Department has adopted an extensive set of regulations pertaining to "Licensing and Certification of Health Facilities, Home Health Agencies, Clinics, and Referral Agencies." (Title 22, California Code of Regulations (CCR), division 5.) Among these regulations, sections 70577, 71545, 72461, 73409, and 79315 of Title 22, CCR, prohibit the use of physical restraints and/or seclusion unless ordered by a physician.

To understand the background of the current regulatory challenge, some discussion of the associated legislative and litigation history surrounding the role of psychologists in licensed health care facilities is necessary. In 1978, the Legislature enacted Health and Safety Code section 1316.5. Subdivision (b) provides in part as follows:

> "(1) The rules of a health facility not owned or operated by this state may enable the appointment of clinical psychologists on the terms and conditions that the facility shall establish. In these health facilities, clinical psychologists may . . . carry professional responsibilities consistent with the scope of their licensure and their competence, subject to the rules of the health facility.
>
> "(2) . . . If a health service is offered by a health facility with both licensed physicians and surgeons and clinical psychologists on the medical staff, which both licensed physicians and surgeons and clinical psychologists are authorized by law to perform, *the service may be performed by either, without discrimination*." [Emphasis added.]

Following the enactment of this legislation, the Department reissued regulations that prohibited licensed facilities from allowing licensed psychologists to exercise primary responsibility in providing diagnosis and treatment of patients.

These regulations were subsequently challenged by a group of psychologists in *California Association of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 270 Cal.Rptr. 796. The plaintiffs contended that the Legislature had intended licensed clinical psychologists to be able to function without the need for supervision by physicians. They maintained that clinical psychologists as well as physicians should be allowed to take primary responsibility for the treatment and care of patients.

The California Supreme Court agreed with the psychologists. It held as follows:

> "We conclude that [the statute] means what the trial court said it meant: that a hospital may permit clinical psychologists on its staff to provide psychological services within the legal scope of their licensure, without physician supervision and without discriminatory restrictions." (51 Cal.3d at 14, 270 Cal.Rptr. at 803.)
>
> * * * *
>
> ". . . The Legislature here has chosen to leave the matter to the discretion of each hospital. By authorizing hospitals to permit psychologists to carry responsibilities consistent with their licensure, it has given hospitals discretion to allow psychologists to assume the same responsibilities vis-à-vis their hospitalized patients as in an outpatient setting. Under section 1316.5, hospitals may also adopt nondiscriminatory rules that may restrict the psychologist's scope of practice. *Section 1316.5 does not permit the courts, or the Department, to enact such restrictions themselves*." (51 Cal.3d at 19, 270 Cal.Rptr. at 806 [Emphasis added].)

Subsequently, the California Psychological Association filed a petition with the Department in 1993 requesting that sections 70577, 71545, 72461, 73409, and 79315 of Title 22, CCR, be amended[2] in order to be consistent with section 1316.5 of the Health and Safety Code and the *Rank* holding.[3]

---

2. Department's response to request for determination, p. 1.
3. The *Rank* court stated that, pursuant to Health and Safety Code section 1316.5, "a hospital that admits clinical psychologists to its staff may permit such psychologists [as well as physicians] to take primary responsibility for the admission, diagnosis, treatment, and discharge of their patients," (51 Cal.3d at 21, 270 Cal.Rptr. at 808), and invalidated the two departmental regulations that prevented psychologists from taking primary responsibility for their hospitalized patients. This case, however, did not address whether clinical psychologists may order physical restraints or seclusion, along with physicians. Because these particular challenged amendments were not addressed by the *Rank* court, but implement Health and Safety Code section 1316.5

The Department agreed with the petition and, in 1994, issued a memorandum addressed to general acute care hospitals, acute psychiatric hospitals, skilled nursing facilities, intermediate care facilities, and chemical dependency recovery hospitals which purported to amend the five existing regulations specified above.[4] In the memorandum, the Department states that "Regulatory amendments will be promulgated and filed at a later time when there are fewer budgetary constraints and pressure on personnel resources. However, effective immediately, the Department agrees to implement its intent to permit psychologists . . . to order restraint and/or seclusion in the same manner as a physician as specified [in the five regulations set forth in the memorandum]."[5]

The following is an example of one of these amended regulations (language added by the Department is underlined):

> "Patients shall be placed in restraint only on the written order of the physician or clinical psychologist. This order shall include the reason for restraint and the type of restraint to be used. In a clear case of emergency, a patient may be placed in restraint at the discretion of a registered nurse and a verbal or written order obtained thereafter. If a verbal order is obtained it shall be recorded in the patient's medical record and signed by the physician or clinical psychologist on his next visit." (Title 22, CCR, section 71545, subdivision (b), as purportedly amended by the Department's April 27, 1994 memorandum.)

At issue in this determination are the amendments to the five existing departmental regulations that would permit clinical psychologists as well as physicians to order restraint and/or seclusion for patients or residents of facilities listed in the memorandum.

A determination of whether the Department's amendments are "regulations" subject to the APA depends on (1) whether the APA is generally applicable to the quasi-legislative enactments of the Department, (2) whether the challenged amendments are "regulations" within the meaning of Government Code section 11342.600, and (3) whether the challenged amendments fall within any recognized exemption from

---

and conform to the *Rank* ruling, the challenged amendments to the five departmental regulations cannot be made as a "change without regulatory effect" pursuant to section 100 of Title 1 of the CCR.

4. See Department memorandum dated April 27, 1994, attached to request for determination.
5. *Id.*

APA requirements.

(1) As a general matter, all state agencies in the executive branch of government and not expressly or specifically exempted are required to comply with the rulemaking provisions of the APA when engaged in quasi-legislative activities. (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747; Government Code sections 11342.520; 11346.) In this connection, the term "state agency" includes, for purposes applicable to the APA, "every state office, officer, department, division, bureau, board, and commission." (Government Code section 11000.) The Department is in neither the judicial nor legislative branch of state government, and therefore, unless expressly or specifically exempted therefrom, the APA rulemaking requirements generally apply to the Department.

In addition, Health and Safety Code section 1275, subdivision (a), provides in part as follows:

> "The state department shall adopt, amend, or repeal, in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code . . . any reasonable rules and regulations as may be necessary or proper to carry out the purposes and intent of this chapter and to enable the state department to exercise the powers and perform the duties conferred upon it by this chapter . . . ."

Thus, we conclude that APA rulemaking requirements generally apply to the Department. (See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA).)

(2) Government Code section 11340.5, subdivision (a), prohibits state agencies from issuing rules without complying with the APA. It states as follows:

> "(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation['] as defined in subdivision (g) of Section 11342.600, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

Government Code section 11342.600, defines "regulation" as follows:

> ". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. . . . [Emphasis added.]"

According to *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274 -275, agencies need not adopt as regulations those rules contained in a "'statutory scheme which the Legislature has [already] established . . . .'" But "to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . ."

Similarly, agency rules properly adopted *as regulations* (i.e., California Code of Regulations ("CCR") provisions) cannot legally be "embellished upon." For example, *Union of American Physicians and Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 500, 272 Cal.Rptr. 886, 891 held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation. Statutes may legally be amended only through the legislative process; duly adopted regulations—generally speaking—may legally be amended only through the APA rulemaking process.

Under Government Code section 11342.600, a rule is a "regulation" for these purposes if (1) the challenged rule is *either* a rule or standard of general application *or* a modification or supplement to such a rule and (2) the challenged rule has been adopted by the agency to *either* implement, interpret, or make specific the law enforced or administered by the agency, *or* govern the agency's procedure. (See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251; *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, 890.)

In this analysis, we are guided by the California Court of Appeal in *Grier v. Kizer*, *supra*:

> "[B]ecause the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead*, . . . 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.* [Emphasis added.]" (219 Cal.App.3d at 438, 268 Cal.Rptr. at 253.[6])

For an agency policy to be a "standard of general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).)

In this case, the challenged amendments apply to all members of the class, kind, or order consisting of health care facilities licensed under Health and Safety Code section 1268 and regulated under section 1276, as well as clinical psychologists who work at these health facilities. Therefore, these amendments are standards of general application.

The next question is whether the challenged amendments implement, interpret or make specific the law enforced or administered by the Department. In this respect, agencies need not adopt as regulations those rules contained in a "'statutory scheme which the Legislature has [already] established . . . .'" (*Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274 – 75.)

In addition to the rulemaking provisions set forth in Health and Safety Code section 1275, subdivision (a) (quoted above), Health and Safety Code section 1276 provides in part as follows:

> "(a) [T]he regulations adopted by the [Department of Health Services] shall, as applicable, prescribe standards of adequacy, safety, and sanitation of the physical plant, of staffing with duly qualified licensed personnel, and of services, based on the type of health facility and the needs of the persons served thereby."

---

6. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198. *Grier*, however, is still good law for these purposes.

The challenged amendments consist of adding the terms "clinical psychologist" to several different regulations. For instance, Title 22, CCR, section 70577, subdivision (j)(2), concerning psychiatric units in general acute care hospitals, was modified as follows:

> "Patients shall be placed in restraint only on the written order of the physician or clinical psychologist."[7] [Underlined language added by the Department's April 27, 1994 memorandum.]

In the case of skilled nursing facilities, the amendment would allow a clinical psychologist to authorize restraint and seclusion orders that must be renewed every 24 hours. (Title 22, CCR, section 72461, subdivision (a).) In an emergency situation where physical injury is threatened, immediate restraint may be applied, but must be followed-up with an order from a physician or a clinical psychologist within one hour. (*Id*.)

For chemical dependency recovery hospitals, the amendment would permit physical and treatment restraints upon a clinical psychologist's, as well as a physician's, written or verbal order (verbal orders are allowed if certain procedures are followed). (Title 22, CCR, section 79315, subdivision (c), as modified by the Department's April 27, 1994 memorandum.)

We find that the challenged amendments to the Department's regulations implement, interpret, and make specific Health and Safety Code sections 1275 and 1276, and furthermore, modify the five existing regulations that are administered and enforced by the Department without complying with the APA.

For these reasons, we conclude that the challenged amendments are themselves "regulations" and are subject to the APA unless expressly exempted by statute.

(3) With respect to whether the Department's rules fall within any recognized exemption from APA requirements, generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute. (Government Code section 11346; *Winzler & Kelly v. Department of Industrial Relations, supra,* 121 Cal.App.3d at 126, 174 Cal.Rptr. at 747.)

---

7. Department's memorandum dated April 27, 1994, p. 2.

The Department does not contend that any *express* statutory exemption applies. It has acknowledged that the amendments it promulgated were not adopted pursuant to the APA.[8] The Department has, however, raised what could be termed an *implied* exemption argument based on "program flexibility." To this end, it states as follows:

> "Unfortunately, the Department did not have the resources at that time to process the regulatory revisions. *It therefore used a procedure with which facilities were familiar, program flexibility, to notify facilities* that:
>
> (a) to the extent the regulations restricted psychologists' ability to order the application of restraints or the use of seclusion, the regulations were unenforceable; and,
>
> (b) facilities had the ability to comply with the regulatory obligation of restricting the ability of facility staff to order the application of restraints or the use of seclusion to those practitioners whose scopes of practice enabled them to so order, by allowing psychologists as well as physicians to order them."[9] [Emphasis added.]

The Department's April 27, 1994 memorandum grants general acute care hospitals, acute psychiatric hospitals, skilled nursing facilities, intermediate care facilities, and chemical dependency recovery hospitals "program flexibility [pursuant to Health and Safety Code section 1276] from the requirements of sections 70577, 71545, 72461, 73409, and 79315, respectively, of Title 22 of the [CCR] in order to allow clinical psychologists to order restraint and/or seclusion for patients or residents of those facilities."

We note that section 1276 allows the Department to grant program flexibility to facilities to enable them to use alternate means other than those specifically required by regulations as long as statutory requirements are met. However, section 1276 also establishes the procedures to be followed by applicants and licensees when submitting a request to the Department for program flexibility. The request must be in writing and supported by evidence. Section 1276 also requires the Department to develop a standardized form and format for requests submitted by health facilities for program flexibility. The Department has 60 days after receiving a complete application in which to approve, approve with conditions or modifications, or deny an application.

---

8. Department's response to request for determination, p. 2.
9. *Id*.

A reading of section 1276 shows that its intended use was for the Department to grant program flexibility to an individual health facility, after receipt of a written request for program flexibility with supporting evidence, on a case-by-case basis. We believe section 1276 was not intended to allow the Department to issue general rules applicable to several facilities across the board, thereby skirting the requirements of the APA.

Furthermore, rules issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute. (Government Code section 11346.) There is nothing in either the Department's enabling legislation or the APA that expressly provides for an exemption based on "program flexibility." Thus, the Department's amendments are not exempted from the rulemaking requirements of the APA.

We conclude, therefore, that amendments to existing regulations permitting clinical psychologists at licensed health care facilities to order patients to be placed in physical restraints or seclusion constitute "regulations" as defined in Government Code section 11342.600, and are required to be adopted and codified pursuant to the rulemaking procedures of the APA.

/ / / / / / / / / / / /

DATE: March 19, 2001

DAVID B. JUDSON
Deputy Director and Chief Counsel

_____

DEBRA M. CORNEZ
Senior Staff Counsel
Determinations Program Coordinator

Regulatory Determinations Program
Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, California 95814
(916) 323-6225, CALNET 8-473-6225
Facsimile No. (916) 323-6826
Electronic Mail: staff@oal.ca.gov

i:\2001.2